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Supreme Court of the United States.

October Term, 1922.

THE UNITED STATES, *Appellant*,
v.
HARRY W. LUSKEY. } No. 371.

I. STATEMENT OF THE CASE.

The claim asserted by the claimant and allowed by the Court of Claims was that of a Chief Machinist's Mate (a petty officer, constituting the highest grade of enlisted man) United States Navy, for fifty per cent increase of pay on account of having been detailed for duty involving actual flying in aircraft.

The claim is based upon the following provision of the naval appropriation act of March 3, 1915, chapter 83 (38 Stat. 928, 939):

"Hereafter enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in air craft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service, or rank and service, as the case may be, plus fifty per centum increase thereof;"

Luskey was by authority of the commanding officer at Pensacola, Florida, confirmed by the Secretary of the Navy, detailed for duty involving actual flying in aircraft September 15, 1915, and continued on that duty until after February 1, 1917. He was on duty at the Navy aeronautic station, Pensacola, Fla., until January 2, 1917, when he was transferred to a ship on aeronautic duty, to wit, to the U. S. S. *Seattle*.

During all that time he was under orders detailing him for duty involving actual flying and made actual flights. During the period covered by this claim, he made one flight in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered. (Finding I, rec. foot p. 2.)

He at first received the fifty per cent increase allowed by the act of 1915 for the entire period covered by this claim, July 1, 1916, to January 31, 1917. At a later date the amount was checked against and deducted from his pay.

On application to the accounting officers of the Treasury for such pay for that period he was allowed and paid the increase for the month of December, 1916.

If entitled to be paid fifty per cent increase for the remaining six months of the claim he would receive $279.95. For this sum the Court of Claims awarded him a judgment. (Finding II, rec. top p. 3; conclusion of law.)

The terse but clear opinion of the Court of Claims, occupies less than one page of this record (pp. 3, 4) and is reported 56 C. Cls. 411.

The United States appealed (middle p. 4).

II. BRIEF OF ARGUMENT.

Statement of the Question.

The law allows the fifty per cent increase to enlisted men of the Navy "while detailed for duty involving actual flying in air craft." This enlisted man was so detailed. It is true that during the period involved in this claim he made but one actual flight in September, 1916, besides two others in December, 1916, for which latter month the increase has been conceded and paid.

The law does not require that an enlisted man de-

tailed for this duty shall make any particular number of flights or at any particular intervals. It is only that he shall be detailed for that kind of duty.

The Engard Case.

The question is analogous to that decided in *United States* v. *Engard*, 196 U. S. 511. There an officer on sea duty was ordered to temporary duty in connection with the inspection of certain ship material in the State of Ohio, adding "This duty is in addition to your present duties" (p. 512). He was engaged 122 days on the temporary work in Ohio to which he was assigned. It was therefore asserted by the United States that for that period he was entitled only to shore pay, which, under the law then in force, was lower than sea pay.

The court in an opinion by Mr. Justice White, afterwards Chief Justice, said (pp. 515, 516):

"In the present case it can not be denied that the officer was assigned to sea duty and that the order of the Department, instead of detaching him therefrom, simply ordered him to discharge a temporary service ashore in addition to his sea service. The whole contention of the Government is that this temporary shore service was necessarily incompatible with the continued performance of the officer's duty on the ship to which he continued to be attached, and therefore that the shore duty was paramount to the sea service, and necessarily by operation of law affected the detachment of the officer so as to permanently relieve him from the sea duty to which he continued to be regularly assigned.

"There is no finding in the record, however, which justifies this argument, and as urged at bar it rests upon the mere assumption of the incompatibility between the sea duty to which the officer was regularly assigned and the temporary shore duty which he was called upon by the Department to discharge. In effect, the proposition is that it must be assumed as a

matter of law, in the absence of a finding to that effect, that the temporary shore duty was of such a permanent character as to render it impossible for the officer to continue to perform duty under his permanent sea assignment, and, therefore, as a matter of law caused such an assignment to terminate. We think the converse is true, and that where the assignment of an officer to duty by the Navy Department expressly imposed upon him the continued discharge of his sea duties and qualified the shore duty as merely temporary and ancillary to the regular sea duty, that the presumption is that the shore duty was temporary, and did not operate to interfere with or discharge the officer from the responsibilities of his sea duty to which he was regularly assigned."

"DETAILED" DEFINED.

Other constructions of this word "detailed" when used in a similar connection are contained in several departmental decisions.

In 15 Comp. Dec. 894, construction was placed upon a general order providing that "any enlisted man of the Navy detailed to perform the duties of ship's tailor * * * shall receive $20 per month in addition to the monthly pay of his rating." It was held that an enlisted man, so long as detailed for that purpose, was entitled to the additional pay, even though absent on leave. Reference was made (15 Comp. Dec. 895) to another decision as follows:

"General Order No. 178, November 29, 1904, of the Navy Department, provides:

'Ordinary seamen detailed as jacks-of-the-dust or as lamplighters shall receive $5 per month in addition to their pay.'

In 34 MS. Comp. Dec. 563 (Memoranda Bureau Supplies and Accounts No. 54, pp. 585, 586) August 17, 1905, referring to said General Order No. 178, it was said:

'To entitle an ordinary seaman to additional pay under this executive order I am of opinion that it is sufficient if the detail is made, and he is entitled to the pay so long as the detail continues, even though on leave. In other words, it is dependent upon the detail rather than upon the service.'"

A decision of December 1, 1910 (Memoranda Bureau Supplies and Accounts, No. 117, p. 1617) construed an executive order:

"Chief petty officers detailed as instructors of apprentice seamen * * * shall receive hereafter in addition to their pay the sum of $10 per month, while so detailed," etc.

The Comptroller said (p. 1618):

"The President may fix the pay upon such conditions and under such limitations as he may see fit to impose. By the Executive Order of November 27, 1906, he authorizes additional pay to the petty officers detailed as instructors of apprentice seaman at $10 per month 'while so detailed.' The language is clear and unambiguous and entitles the said petty officers to the additional pay while the detail is in effect. I am of opinion, therefore that you are authorized to pay the petty officers you refer to the additional pay for the time while they were on leave and also while absent undergoing examination for promotion to warrant officers, provided the details were unrevoked and details of other instructors were not made to supply their places while absent. See 15 Comp. Dec. 894, and decision of this office of August 17, 1905 (34 Comp. MS. Dec. 563; Pm. Memo. No. 54)."

Official Letters and Reports.

These decisions are very strongly emphasized by a consideration of grounds assigned in official statements as to the object of such provisions.

The Secretary of War in advocating similar legislation for the Army officially informed Congress August 30, 1912, Senate Report No. 1174, 62d Congress, 3d Session (p. 2):

"It has been recently brought to my attention that insurance companies have, as a rule, canceled the policies of officers engaged in aviation, and that the general policy of these companies throughout the country is to refuse insurance to any aviator. Thus it appears that the officers engaged in this very hazardous class of duty are not only subject to great personal risk, but also lose the benefits of any insurance which they may have."

These reasons apply to officers under detail for aviation duty with quite as much force as they do to those constantly engaged in flying.

The Secretary of the Navy in a communication addressed to the Speaker of the House, February 21, 1918, House Doc. No. 957, 65th Cong. 2d Session, says (pp. 2, 3):

"One of the strong arguments always advanced for the necessity of increased pay for those assigned to flying was the fact that such detail prevented them from obtaining life insurance from civil insurance companies, except at almost prohibitive rates, if indeed it could be procured at all. The weight of this argument has been greatly lessened since the enactment of the so-called soldiers' and sailors' insurance act of October 6, 1917, which provides for insurance by the Government, applicable to all officers and men on active duty, including those assigned to flying duties."

This passage only reiterates the grounds originally advanced in favor of an increase in the compensation of aviators, to-wit, that it was impossible for them to get favorable rates for insurance while under detail for

aviation duty, under which they were liable to be ordered to make flights at any time.

Congress thereupon (at a date subsequent to that at which this claim accrued) provided in the naval appropriation act of July 1, 1918, Chapter 114 (40 Stat. 718):

"That hereafter the allowances of officers, enlisted men, and student flyers of the naval service shall in no case be increased by reason of the performance of aviation duty."

This act took away increased allowances (as distinguished from pay proper) for aviation duty of officers and enlisted men, etc., of the Navy

OTHER LEGISLATION AND ORDERS.

General Order #205, Navy Department, April 12, 1916 (brief for United States, pp. 7, 8), was the only existing regulation under the act at the time this claim accrued. It contains nothing which in the least degree militates against this claim. On the contrary, as is stated in the brief for the United States (p. 8) the Navy Department took the position that the detail was conclusive.

The decision of the Comptroller (quoted last half p. 8 and first half p. 9, brief for the United States) changed the practice which had existed for two years since the passage of the act.

The following from the published Memoranda Bureau Supplies and Accounts, Vol. 7, No. 198, p. 4323, is material:

"AVIATION: Payments of additional pay made prior to 1 May, 1917.

"In connection with the decision of the Comptroller of the Treasury, published at page 4226 of Bureau Memoranda 194, the following letter, dated 11 Septem-

ber, 1917, from the Comptroller to the Judge Advocate General of the Navy, is published for the information of all concerned:

"I have received your letter of the 7th instant in reference to the decision of this office of April 21, 1917 (23 Comp. Dec. 589), upon the question of the evidence required to substantiate the pay accounts of officers detailed for aviation duty.

"In view of the fact that said decision was one which changed an existing practice of the accounting officers in so far as regards evidence required in making payment to officers detailed to aviation duty, said decision in accordance with the usual practice will not be made retroactive against disbursing officers of the Navy or Marine Corps as to payments made by such disbursing officers for periods prior to May 1, 1917, on account of additional pay to officers detailed for duty involving actual flying in aircraft, where the officer was properly detailed to said duty and made a flight or flights under the authority of such detail.

"This will not affect the settlement of a claim by any officer when presented to the Auditor for the Navy Department, any such claim to be settled upon the facts developed and the law applicable thereto."

As the payments in this case all antedated the date (May 1, 1917), stated in this ruling or order of the Comptroller they should not have been deducted from the claimant's pay.

General Order No. 377, March 14, 1918 (brief for the United States, pp. 9, 10), can not control this case as it was made more than a year after the last date covered by this claim.

Army Law and Decision.

The Army act of July 18, 1914, Chapter 186, Sec. 3 (38 Stat. 514–516), is quoted in the brief for the United States (pp. 10, 11).

The Judge Advocate General did, indeed (brief for United States, p. 12), give an opinion in response to a request of the Acting Chief Signal Officer. The language quoted (p. 12) is that of the Signal Officer in submitting the question. This opinion of the Judge Advocate General can only be understood by reading the entire opinion, which we give as an appendix to this brief, *post*, pp. 11, 12. The act of March 2, 1913, Chapter 93 (37 Stat. 704, 705), on this same subject was there held to be in force as consistent with later legislation. The material portion of that act (37 Stat. 705) follows:

"*Provided further,* That from and after the passage and approval of this Act the pay and allowances that are now or may be hereafter fixed by law for officers of the Regular Army shall be increased thirty-five per centum for such officers as are now or may be hereafter detailed by the Secretary of War on aviation duty: *Provided,* That this increase of pay and allowances shall be given to such officers only as are actual flyers of heavier than air craft, and while so detailed."

The construction of the law by the Judge Advocate General of the Army is the same as that here contended for in regard to the aviation provisions of the navy law. The Judge Advocate General says (*post*, p. 12):

"The detail recommended would, I think, be within the purpose of the law, which is to provide increase of pay for an officer who incurs the risk under proper detail on aviation duty as an actual flier of heavier-than-air craft."

Conclusion.

We have not argued the question whether assuming that payments to an enlisted man have been made on a mistaken construction of the statute they could properly

be charged against his subsequently accruing pay. The Attorney General in 1896 decided that they could not (21 Opns. 323). For this conclusion several decisions of this court might be cited: *United States* v. *Freeman*, 3 Howard, 556, 564; *United States* v. *Hill*, 120 U. S. 169, 182; *Badeau* v. *United States*, 130 U. S. 439, 452; *United States* v. *Alabama Railroad Company*, 142 U. S. 615, 621.

It is enough that a statute passed in 1915 is shown to have been intended by Congress to allow the aviation increase for just such services as are here claimed; that that construction was for two years acted upon by the Navy Department and the accounting officers as the only one in accordance with the reasonable and ordinary meaning of the words used by Congress; that only in 1917, after all these services had been performed, was a different construction placed upon it; and that even then that construction was declared not to be retroactive.

The judgment of the Court of Claims should be affirmed.

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Attorneys for Appellee.

APPENDIX.

WAR DEPARTMENT,
J. A. G. O.,
October 9, 1915.

TO THE ADJUTANT GENERAL:

1. The views of this office are desired with reference to the request of the acting chief signal officer, October 4, 1915, that 1st Lieutenant C. C. Culver, 3d Cavalry, be detailed by the Secretary of War *on aviation duty* under the act of Congress approved March 2, 1913 (37 Stat. 705), for the purpose of developing a suitable system of radio communication from aeroplanes. In submitting the request the acting chief signal officer says:

"In order that Lieut. Culver may intelligently conduct his experiments it is necessary for him to fly during the period of the development of the apparatus. While flying Lieut. Culver is subject to the same risks as any officer now on flying duty and should, it is believed, receive while on duty which requires him to participate regularly and frequently in aerial flights the same compensation to cover the extra hazard as is paid to the other officers on similar duty. * * * Lieut. Culver is at present voluntarily flying without any compensation, as he has found it necessary to do so in connection with the duty ordered under paragraph 22, S. O. 192, W. D. August 18, 1915," *i. e.*, the order detailing him for the duty stated above.

2. It was held by this office in an opinion dated July 30th that the act of March 2, 1913, *supra*, was not repealed by the later act of July 18, 1914, providing for an aviation organization within the Signal Corps; and this view received the informal approval of the Comptroller. As stated by the acting Chief Signal Officer,

Lieut. Culver, while flying, is subject to the same risks as an officer regularly detailed for the purpose of qualifying as an aviator; and the detail recommended would, I think, be within the purpose of the law, which is to provide increase of pay for an officer who incurs the risk under proper detail on aviation duty as an actual flier of heavier-than-air craft. The purpose for which he is detailed is connected with the efficiency of the aviation service, and in order to effectively perform this duty it is necessary for him to incur the risk of an actual flier of heavier-than-air craft. I do not think that the statute should be construed to provide only for those who are detailed with a view to their qualifying as an actual flier of heavier-than-air craft, but that it would be the fair intent of the law to make the detail on aviation duty for the purpose now under consideration.

E. H. CROWDER,
Judge Advocate General.

Approved: By order of the Secretary of War.

H. L. SCOTT,
Major General, Chief of Staff.